IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3986 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 to 5 NO

R A SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 3986 of 2002

MR P CHIDAMBARAM with MR BIJAL CHATRAPATI
for SINGHI & CO for Petitioner No. 1-8
MR KAMAL B TRIVEDI ADDL ADVOCATE GENERAL with
MR ARUN D OZA PUBLIC PROSECUTOR for Respondents

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 25/10/2002

C.A.V.UDGEMENT

1. This petition by some of the directors of the company, joined as accused No.23 in Criminal Case No.5 of 2002, is directed against issuance of process against them by the learned Judicial Magistrate, First Class at Nadiad. The original complaint is regarding the alleged offence punishable under Section 16 (1) of the Prevention of Food Adulteration Act, 1954 ('the PFA Act' for short) for the sample of "Rejoint Dietary Supplement" being found to be adulterated and misbranded within the meaning and definitions of Section 2 (ia), (a), (b) (m) and Section 2 (ix) thereof.

2. According to the petition, the petitioner Nos.1 to 5 (i.e. the original accused Nos.11, 13, 14, 16 and 19) are non-executive directors of the company; and petitioner Nos.6, 7 and 8 (original accused Nos.9, 10 and 20), though functioning in the executive capacity, were nonetheless not involved in the day-to-day operations of the company. The sample of the product marketed as "Rejoint Dietary Supplement Capsule" did not conform to the standards and provisions laid down under the Prevention of Food Adulteration Rules, 1955 ('the PFA Rules' for short) and alleged to be misbranded under Section 2 (ix) (k) of the PFA Act as it did not comply with Rule 32 (B) of the PFA Rules, according to the analysis report dated 13.12.2001. Upon a complaint being filed on that basis against the partners of the vendor firm (accused Nos.1 to 8, who are not parties herein) and the directors and the officials of the manufacturing company, who is the original accused No.23 (who also is not a petitioner herein), the summons were ordered to be issued in the Criminal Case No.5 of 2002.

3. This petition under Section 482 of the Code of Criminal Procedure, 1973 ('the Cr.PC' for short) was pressed and argued mainly on the basis that the accused company had entrusted its day-to-day operations to various senior managerial personnel who were in charge of and responsible to the company for the conduct of its business. The factory, where the aforesaid product was manufactured, was run under the general supervision and overall control of one Mr A.K.Bhat, who was also notified as the "Manager" under the Factories Act. He was also in charge of the company's other factories and he used to submit compliance certificate regarding observance of various statutory requirements to Mr.Vijay Shah, who was the Chief Operating Officer and who, in turn, submitted compliance certificate to the Board of Directors. It is further averred in the petition that one Dr.V.K.Joshi performed the functions of setting up quality assurance standards and looked after compliance thereof. It was

thus argued that the petitioners, as the directors, were not in any way connected with the day-to-day activities of the company. Although it is elaborately contended in the petition that no offence as alleged in the complaint has been made out, those contentions were not pressed in this petition since another petition by the company was admitted and yet to be heard, inter alia, on those grounds.

4. The learned senior counsel Mr.P.Chidambaram, appearing for the petitioners, pointed out from the original complaint that except for joining the petitioners as directors of the company in the cause title of the complaint, no allegation whatsoever of any kind was made against the petitioners in the body of the complaint. Therefore, even assuming that no person was nominated to be in charge of and responsible to the company for the conduct of its business as envisaged in Section 17 (1) (a) (i) of the PFA Act, all the directors cannot be presumed to be in charge of and responsible to the company for the conduct of its business; nor can they be presumed to be guilty of consent, connivance or negligence as envisaged in sub-section (4) of Section 17 of the PFA Act, more particularly in absence of even a bare allegation in the complaint. The issuance of process by the learned JMFC was, therefore, contended to be without application of mind.

4.1 The judgment of the Apex Court in MUNICIPAL CORPORATION OF DELHI v. RAM KISHAN ROHTAGI AND OTHERS [AIR 1983 SC 67] was relied upon for the observations, as under, contained therein:-

> "15. So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances, therefore, we find ourselves in complete agreement with the argument of the High Court that no case against the Directors (accused Nos.4 to 7) has been made out ex facie on the allegations made in the complaint and the proceedings against them were

rightly quashed."

It is also observed by Their Lordships in the following para in the same judgment that there are ample powers of the Court to take cognizance and add any person not being an accused before it and when the proceedings were quashed against certain accused persons, it would not prevent the trial court from exercising its discretion if it were fully satisfied that a case for taking cognizance against them was made out on the additional evidence led before it.

4.2 The judgment of the Supreme Court in K.P.G.NAIR v. M/S. JINDAL MENTHOL INDIA LTD. [JT 2000 (Suppl.) SC 519] was also relied upon in support of the submission that a person other than the company can be proceeded against under similar provisions only if that person is in charge of and responsible to the company for the conduct of its business. It is clearly observed in that judgment that the words indicating essential ingredients for fastening the vicarious liability might not be incorporated in a complaint as magic words but it cannot also be disputed that substance of the allegations read as a whole should answer and fulfil the requirements of the ingredients of the provisions for proceeding against the accused persons.

5. The learned Additional Advocate General Mr. K.B.Trivedi submitted, relying upon the judgment of the Apex Court in K.M.MATHEW v. STATE OF KERALA [AIR 1992 SC 2206] , that it was open to the accused to plead before the Magistrate that the process against him ought not to have been issued. It is also, however, observed in the same judgment that: ".....the need to try the accused arises when thee is allegation in the complaint that the accused has committed the crime. If there is no allegation in the complaint involving the accused in the commission of the crime, it is implied that the Magistrate has no jurisdiction to proceed against the accused....." ".....no person should be tried without a prima facie case." It was contended that the petitioners could have pleaded for dropping of the proceedings in the trial court itself.

5.1 In a later judgment in JOHN THOMAS v. DR. K. JAGADEESAN [JT 2001 (5) SC 398], the Supreme Court has, after referring to the above judgment in K.M.MATHEW (supra), held as under:

"Section 258 of the Code is intended to cover those cases belonging to one category alone i.e.

"summons cases instituted otherwise than upon complaints". Section 258 vivisects only "summons cases instituted otherwise than on complaints" into two divisions. One division consists of cases in which no evidence of material witness was recorded. The Section permits the court to

acquit the accused prematurely only in those summons cases instituted otherwise than on complaints wherein the evidence of material witnesses was recorded. But the power of court to discharge an accused at midway stage is restricted to those cases instituted otherwise than on complaints wherein no material witness was examined at all."

6. In the above facts and circumstances, the petition is required to be allowed to the extent that the complaint in Criminal Case No.5 of 2002 pending before the learned Judicial Magistrate, First Class at Nadiad, as far as the petitioners are concerned, has to be quashed at this stage. It has to be, however, clarified that, as observed in the judgment in MUNICIPAL CORPORATION OF DELHI (supra), the trial court shall have the powers to take cognizance and add any person as accused on the basis of the evidence that may be led before it. Accordingly, if the prosecution can, at any stage, produce evidence which satisfies the court that any person who is not arraigned as accused, or against whom proceedings have been quashed, has committed the offence, the court will take cognizance against him and try him along with the other accused. Suffice it to state that such exercise of power will be in the discretion of the court which may be exercised in accordance with law and having regard to the provisions of Section 319 of the Cr.PC. It should, however, be

clear that the mere fact that the proceedings have been hereby quashed against the petitioners will not prevent the court from exercising its discretion if it is satisfied that a case for taking cognizance against them were made out on the evidence led before it. Rule made absolute accordingly with no order as to costs.

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)